Supreme Court, U.S.
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No. 99- 991647 APR 1 2 2000

IN THE

Supreme Court of the United States

AMERICAN TARGET ADVERTISING, INC.,
Petitioner,

v.

FRANCINE A. GIANI, DIRECTOR,
UTAH DIVISION OF CONSUMER PROTECTION,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Petitioner, a Virginia corporation, provides professional advice and consulting services to nonprofit organizations that engage in large-scale mailings in order to promote public policy positions, to convey information, and to seek adherents and financial support. The Utah Charitable Solicitations Act, Utah Code Ann. § 13-22-1 *et seq.*, imposes registration and disclosure requirements not just on the organizations that send such mailings into Utah, but on firms, like petitioner, that advise such organizations.

The questions presented are:

1. Whether the registration and disclosure requirements imposed on petitioner violate the First Amendment rights of petitioner and the organizations it advises.

2. Whether the registration and disclosure requirements violate the Commerce Clause, when applied to a firm that, like petitioner, is organized under the laws of another state, does no business in Utah, and has no contact with Utah citizens.

3. Whether the registration and disclosure requirements, as applied to petitioner, constitute extraterritorial legislation in violation of the Due Process Clause of the Fourteenth Amendment.

PARTIES TO THE PROCEEDING

All the parties are named in the caption. American Target Advertising, Inc., is a wholly owned subsidiary of The Viguerie Company, a Virginia Corporation.

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PETITION FOR A WRIT OF CERTIORARI

American Target Advertising, Inc., respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Tenth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-20a) is reported at 199 F. 3d 1241. The opinion of the district court (Pet. App. 21a-36a) is reported at 23 F. Supp. 2d 1303.

JURISDICTION

The judgment of the court of appeals was entered on January 13, 2000. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The First Amendment to the United States Constitution provides in pertinent part:

> Congress shall make no law * * * abridging the freedom of speech * * *.

Section 1 of the Fourteenth Amendment to the United States Constitution provides in pertinent part:

> No State shall * * * deprive any person of life, liberty, or property, without due process of law * * *.

The Utah Charitable Solicitations Act, Utah Code Ann. §§ 13-22-1 *et seq.*, is set forth at Pet. App. 37a-63a.

STATEMENT

This case presents recurring issues of national significance that will greatly affect the availability of one of the most important forms of speech in the United States today. Petitioner American Target Advertising, Inc., (ATA) is a fundraising consultant whose only office and employees are located in Virginia. ATA, like literally hundreds of similar firms, provides advice and related services to nonprofit organizations that wish to use large-scale mailings to promote public policy positions, to convey information, and to seek adherents and financial support. Utah regulates not only the nonprofit organizations that send such mailings into Utah, but organizations like ATA—which does no business in Utah, sends no letters into the state, and does not solicit Utah residents for funds. Utah—like a number of other state and local governments—nonetheless

requires firms like ATA to make extensive and burdensome disclosures, and to obtain a license, before they may give advice—wholly outside of Utah—to nonprofit organizations that mail letters into the state.

These licensing and disclosure requirements are not only highly intrusive; they differ greatly from state to state and locality to locality. As a result, they impose an enormous burden on the ability of firms like ATA to provide professional advice to nonprofit organizations and, as a consequence, on those organizations' ability to communicate with the public. Utah presented no evidence at all of any compensating benefit to the state or its citizens. Neither respondent nor the courts below identified any reason why a state's interests cannot be fully protected by reasonable regulation of the fundraising entities themselves, or by other means that do not restrict First Amendment activities, without imposing a burdensome prior restraint on out-of-state organizations like ATA, and therefore on all nonprofit organizations that rely on the services of ATA and similar firms. The Court should review this important issue in order to clarify the status of an increasingly prevalent form of state and local regulation that both has impermissible extraterritorial effects and severely impedes speech that is at the core of the First Amendment.

1. In 1996, ATA entered into a contract with Judicial Watch, Inc., an ideologically conservative nonprofit corporation located in the District of Columbia. The contract specified that ATA would provide "political and related consulting services" to Judicial Watch (Dist. Ct. App. 4)[1] in connection with letters that Judicial Watch planned to mail throughout the nation. Judicial Watch's letters criticized various high-ranking political officials and described Judicial Watch's activities, including litigation

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[1] "Dist. Ct. App." refers to the appendix filed in the district court.

against these officials.[2] The letters also contained requests for voluntary donations to help Judicial Watch conduct its activities and further promote its nonprofit mission. See Dist. Ct. App. 229-34.

ATA's contract with Judicial Watch stated that ATA "shall prepare creative copy and design, shall act as disclosed agent for the acquisition of production services, shall provide advice about selection of lists for donor acquisition, and shall provide advice about mail dates for mailings conducted by" Judicial Watch. Dist. Ct. App. 16. The contract explicitly stated that "ATA shall not solicit on behalf of" Judicial Watch (*id.* at 17).

2. The Utah Charitable Solicitations Act, Utah Code Ann. §§ 13-22-1 *et seq.*, imposes a variety of registration and disclosure requirements on nonprofit organizations that communicate and solicit by mail within the state. See, *e.g.*, Utah Code Ann. §§ 13-22-5, 13-22-9, 13-22-15. The Utah Act is applicable to organizations governed by Section 501(c)(3) of the Internal Revenue Code (charities) as well as organizations governed by Section 501(c)(4) (advocacy groups). See 26 U.S.C. §§ 501(c)(3), 501(c)(4). The Act also makes it "unlawful for any person or entity to act as a * * * professional fund raising counsel or consultant * * * without first obtaining a permit from" the Utah Division of Consumer Protection. Utah Code Ann. § 13-22-9(1). Utah has applied the Act to entities such as ATA whose services are furnished entirely outside the state.

The Act defines a "[p]rofessional fund raising counsel or consultant" as a person who for compensation engages in one or more of the following activities: "plans, manages, advises, counsels, consults, or prepares material for, or with respect to, the solicitation in this state of contributions for a charitable organization" (Utah Code Ann. § 13-22-2 (11)(a)(i)). The Act requires a license without regard to the time, place, or manner

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[2] Judicial Watch, although ideologically conservative, has filed lawsuits against officials of both major political parties.

of these activities, and a fundraising consultant who wishes to obtain a permit must make a variety of disclosures. These include not only extensive details about the organization, personnel, and finances of the consultant—including the "residence addresses of any officer or director" (Utah Code Ann. § 13-22-9(1)(b)(v))—but also "the purpose of the plan, management, advi[c]e, counsel or preparation of materials" offered by the consultant and "the method by which the plan, management, advi[c]e, counsel, or preparation of materials * * * will be organized or coordinated" (Utah Code Ann. § 13-22-9 (1)(b)(viii)(A), (B)).

3. In February, 1997, Judicial Watch applied for a fundraising license in Utah. The Division notified Judicial Watch that it would not grant the license to Judicial Watch until ATA registered with the Division, unless Judicial Watch agreed either not to use ATA as a consultant or not to pay ATA. Pet. App. 23a-24a. Subsequently the Division granted Judicial Watch a license "contingent upon Judicial Watch's promise not to use the services of any professional fund-raising consultant not licensed in Utah in connection with [its] fund-raising activities in Utah." *Id.* at 24a. ATA, which is not licensed in Utah, then brought this action in the United States District Court for the District of Utah, alleging that the Utah Act violates the First Amendment, the Commerce Clause, and the Due Process Clause of the Fourteenth Amendment. The district court had jurisdiction under 28 U.S.C. § 1331.

The district court granted Utah's motion for summary judgment. The court rejected ATA's First Amendment claims on the ground that Utah's registration and disclosure requirements "are narrowly tailored to enable private citizens to protect themselves from fraudulent activity" and "do not differ materially from those upheld in" this Court's decision in *Riley v. Federation of the Blind*, 487 U.S. 781 (1988). Pet. App. 27a. (The court reached these conclusions even though Utah had not presented any evidence in support of these contentions, and even though the licensing requirement in *Riley* was held unconstitutional (see 487 U.S. at 802)). The district court stated that Utah's licensing

scheme did not violate the Commerce Clause because it "does not have the practical effect of . . . controll[ing] [professional fund-raisers] in other states" (Pet. App. 34a; internal quotation marks omitted) and because the burdens that the Act imposes on interstate commerce are "minimal by comparison" to its benefits. *Id.* at 35a. The district court also concluded that the Act does not violate the Due Process Clause because ATA "has established minimum contacts with the State of Utah" (Pet. App. 36a), even though, at the time the district court reached this conclusion, no letter prepared under the ATA contract had yet been mailed into Utah.

The court of appeals affirmed in part and reversed in part. The court stated that "the Act is content neutral" and therefore subject only to "intermediate scrutiny." Pet. App. 4a. Without citing any evidence in the record except a broad legislative statement about the general purposes for creating the Utah Department of Commerce, the court asserted that various provisions of the Act "target fraud" (*id.* at 5a) and concluded, on that basis, that "[t]he Act therefore serves a substantial government interest." *Ibid.* The court of appeals acknowledged that the Act "qualifies as a prior restraint" (*id.* at 10a), and it declared unconstitutional certain provisions of the Act on the ground that they gave the Director of the Division of Consumer Protection too much discretion to refuse a license. *Id.* at 11a-15a.[3] The court of appeals nonetheless upheld the licensing scheme as a whole, noting that the Division had created an administrative regulation to process an application within ten days of its receipt and to provide an administrative hearing (although not a decision) within five days of a denial of an application. *Id.* at 15a-17a.

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[3] The court of appeals also declared unconstitutional a provision of the Utah Act that required a fundraising consultant to prove that it was bonded, or to provide a letter of credit or cash in the amount of $25,000. See Pet. App. 7a-9a.

The court of appeals then rejected ATA's claim that the Act violates the Commerce Clause. The court admitted that the Act "certainly burden[s] interstate commerce for out-of-state firms like [ATA]." Pet. App. 18a. But the court characterized the burden as "minimal" (*ibid.*). The court of appeals similarly rejected ATA's argument that the Act violates the Due Process Clause. The court reasoned that ATA, by providing services in Virginia to a District of Columbia nonprofit client, had "purposefully direct[ed] efforts toward residents of the state" (*id.* at 20a) and that ATA therefore had the "minimum contacts" required by the Due Process Clause. Pet. App. 20a.

REASONS FOR GRANTING THE PETITION

The issues raised by this case affect, in the most profound way, what is unquestionably one of the most important First Amendment activities in the nation today, the use of direct mail by nonprofit organizations. The court of appeals' resolution of those issues not only violates core First Amendment principles; it permits states to extend their regulatory authority to organizations like ATA that are located outside of Utah, that do no business in the state, and that never come in contact with citizens of Utah. Utah's extraterritorial regulation of ATA's contract with Judicial Watch would violate the Commerce Clause and the Due Process Clause even if this case involved no First Amendment interest. For Utah to extend its regulatory reach in order to impose a burdensome and utterly unjustified prior restraint on core political speech is a compound and dangerous violation of the Constitution.

This form of regulation is, unfortunately, anything but unusual. At least 42 states, and many localities, have charitable registration laws; at least 28 states impose comparable requirements on fundraising consultants like ATA.[4] These extensive

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[4] These laws are tabulated in the appendix to the amicus curiae brief filed by the Free Speech Defense and Education Fund, et al., in the court of appeals.

and varied regulations have compromised both consultants' ability to give advice and nonprofit organizations' ability to engage in direct mail communications that contain solicitations.

The direct mail communications that are affected by this form of regulation are both a pure form of First Amendment expression and a crucial element in the American system of freedom of expression. Direct mail is specifically designed to give individuals access to information that they would not receive through other media. In particular, direct mail allows organizations to communicate information that is of particular importance to their audiences, to disseminate interactive materials such as surveys and questionnaires, and to facilitate efforts to petition the government for redress of grievances. This case is, therefore, of great national importance: hundreds, or perhaps even thousands, of consultants like ATA are affected, as are perhaps tens of thousands of nonprofit organizations that communicate through direct mail. Indeed, the logic of the court of appeals' decision may extend to communication through the internet as well. The Court should grant review in this case to make clear the status of this widespread and intrusive form of extraterritorial regulation of a vital medium of speech.

Finally, the court of appeals' ruling that "intermediate scrutiny" applies to the Utah Act is in conflict with this Court's decisions, which consistently apply strict scrutiny to measures comparable to the Utah Act—indeed to measures that restrict less highly protected expression. The Utah Act places a prior restraint on mailings that constitute the exercise of multiple core First Amendment rights, including not just speech on political subjects but freedom of association and the right to petition the government. At the same time, the state has far less of an interest in regulating the provision of advice outside the state than it does in regulating door-to-door solicitation, and the Court has applied strict scrutiny in cases involving door-to-door solicitation. By applying intermediate scrutiny to a statute that places a prior restraint on speech at the core of the First Amendent, without regard to the time, place, or manner of that speech, the

court of appeals acted in a way that is irreconcilable with this Court's decisions and accordingly warrants further review.

I. THE UTAH ACT IMPOSES A WHOLLY UNJUSTIFIED BURDEN ON A CENTRAL FEATURE OF THE AMERICAN SYSTEM OF FREE EXPRESSION.

1. The Utah Act violates the First Amendment rights of both ATA and the organizations it advises.[5] ATA is itself engaged in speech; it gives advice and counsel to its clients. The definition of "[p]rofessional fund raising counsel or consultant" in the Utah Act specifically refers to activities protected by the First Amendment: a fundraising consultant is "a person who * * * plans, manages, advises, counsels, consults, or prepares material for, or with respect to, the solicitation in this state of contributions for a charitable organization" (Utah Code Ann. § 13-22-2 (11)(a)(i)). The fact that ATA is compensated for its work of course does not mean that its activities are unprotected. See *New York Times v. Sullivan*, 376 U.S. 254, 266 (1964).[6]

Moreover, ATA, like many other firms in its business, itself has developed a reputation in which its public policy positions

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[5] There is no question that ATA may assert the First Amendment rights of its clients in this case. This point is settled by *Secretary of State v. Joseph H. Munson Co., Inc.*, 467 U.S. 947, 955-59 (1984). As in *Munson*, "[t]he activity sought to be protected is at the heart of the business relationship between [ATA] and its clients, and [ATA's] interests in challenging the statute are completely consistent with the First Amendment interests of the charities it [advises]." *Id.* at 958. Indeed, because ATA is challenging the Act only insofar as it affects ATA's own activities—and is challenging the Act on its face—even the approach taken in the dissent in *Munson* would permit ATA to assert its client's First Amendment rights here. See *id.* at 979-80 (Rehnquist, J., dissenting).

[6] Any commercial implications of the relationship between ATA and its client occur either in Virginia or the District of Columbia, and those jurisdictions are amply able to regulate the commercial nature of that relationship. Since ATA does not solicit, there is no nexus—no relationship—between Utah and ATA.

are well known. It enters into contracts with clients with a particular ideological orientation, and it sees its consulting activities as a means of advancing certain public policy positions.[7] ATA's counseling and advice-giving services are, therefore, plainly protected activity under the First Amendment. See, *e.g.*, *In re Primus*, 436 U.S. 412 (1978); *NAACP v. Button*, 371 U.S. 415 (1963); *Thomas v. Collins*, 323 U.S. 516, 531 (1945). The Utah Act's restriction on those activities accordingly can be upheld only if the state can show that the restriction promotes, at the very least, "'a subordinating interest which is compelling'" (*In re Primus*, 436 U.S. at 432, quoting *Bates v. Little Rock*, 361 U.S. 516, 524 (1960)).

In addition to its effect on ATA's own expression, the Utah Act seriously burdens the speech of the nonprofit organizations that ATA advises. In *Village of Schaumburg v. Citizens for a Better Environment*, 444 U.S. 620 (1980), the Court held that "[i]t is clear" that "charitable solicitations * * * are within the protections of the First Amendment" (*id.* at 633) even when, as in *Village of Schaumburg*, the solicitations take the relatively

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[7] The founder and Chairman of ATA, Richard A. Viguerie, is generally considered to be the pioneer of political direct mail. See, *e.g.*, F. Clifton White & William J. Gill, Why Reagan Won: The Conservative Movement 1964-1981 at 53-54 (1981):

> In every election from 1966 onward, the Viguerie Company and its score of imitators and spin-off firms have played a significant role in raising money to elect conservative candidates. In so doing, they also developed into an important new component of mass media. For their fundraising letters also brought information to millions of Americans, information that quite often the people could not obtain from newspapers or television or mass circulation magazines.

The creation of political direct mail has since become common among literally tens or even hundreds of thousands of organizations of every size and every ideological stripe.

intrusive form of door-to-door canvassing. As the Court explained (*id.* at 632):

> [C]haritable appeals for funds * * * involve a variety of speech interests—communication of information, the dissemination and propagation of views and ideas, and the advocacy of causes * * * . [S]olicitation is characteristically intertwined with informative and perhaps persuasive speech seeking support for particular causes or for particular views on economic, political, or social issues, and * * * without solicitation the flow of such information and advocacy would likely cease.

The Court has repeatedly reaffirmed these conclusions. See *Riley v. National Federation of the Blind*, 487 U.S. 781, 787-88 (1988); *Secretary of State v. Joseph H. Munson Company, Inc.*, 467 U.S. 947, 959-60 (1984).

Judicial Watch's mailings perfectly exemplify the way in which, as the Court explained in *Village of Schaumburg*, advocacy can be intertwined with solicitation. Much of each letter was devoted to advocacy about public policy matters and legal ethics, and to a description of Judicial Watch's lawsuits; those core forms of expression are inseparable from the request for a donation. See Dist. Ct. App. 229-34 (reprinting sample letters). Moreover, the conclusions that the Court reached in *Village of Schaumburg* apply far more strongly to direct mail than to in-person solicitation: direct mail is less intrusive than door-to-door solicitation; written communication provides a precise record of what the speaker said, thus greatly reducing the risk of fraud or overreaching; and, in contrast to door-to-door solicitation, the state can easily trace direct mail to the registered non-profit organization.

The Utah Act regulates ATA solely because ATA gives advice and provides services to Judicial Watch to aid it in engaging in this highly protected form of speech. This Court has consistently recognized, in a variety of contexts, that speech can be stifled by regulation that is directed in the first instance not

at the speaker but at others on whom the speaker must rely in order to make its message effective. This is the principle at the core of the landmark decision in *NAACP v. Alabama*, 357 U.S. 449 (1958), where the Court ruled that the freedom of association is protected under the First Amendment not because the association itself was an expressive act but because, in Justice Harlan's words for the Court, "[e]ffective advocacy of both public and private points of view, particularly controversial ones, is undeniably enhanced by group association" (357 U.S. at 460).

Similarly, in *Meyer v. Grant*, 486 U.S. 414 (1988), the Court unanimously invalidated a law that forbade the use of paid solicitors to collect the signatures needed to include an initiative on the ballot. The Court noted that the "refusal to permit appellees to pay petition circulators restricts political expression * * * [by] limit[ing] the number of voices who will convey appellees' message and the hours they can speak and, therefore, limit[ing] the size of the audience they can reach." *Id.* at 422-23 (footnote omitted). The Court added that "[t]he First Amendment protects [the initiative proponents'] right not only to advocate their cause but also to select what they believe to be the most effective means for so doing." *Id.* at 424. The Court accordingly held that the restriction "trenches upon an area in which the importance of First Amendment protections is 'at its zenith.'" *Id.* at 425 (citation omitted).

The unconstitutionality of the Utah Act follows *a fortiori* from *Meyer v. Grant*. While the paid solicitors in *Meyer* physically helped to propagate a message and to collect signatures, fundraising consultants help in the planning and organization of the effort to propagate a message through the mail. The role of a fundraising consultant is precisely to allow the organizations they advise "to select what they believe to be the most effective means" of "advocat[ing] their cause" (*Meyer*, 486 U.S. at 424). The Utah Act, like the Colorado law invalidated in *Meyer*, discriminates between paid and unpaid speakers. See Utah Stat. Ann. § 13-22-2(11)(a)(i). Indeed, the case for allowing the

regulation of petition solicitors—who come into direct contact with members of the public, and who have incentives to engage in impermissible conduct in order to collect more signatures—is far stronger than the case for allowing the regulation of fundraising consultants, especially those who, like ATA, have no presence in the state. And the Colorado statute was invalidated even though, unlike the Utah Act, it did not impose a licensing requirement or a prior restraint on speech.

The Utah Act is a highly selective statute; it is targeted directly on organizations that give advice to speakers engaged in core First Amendment expression, without regard to the time, place, or manner of any activity taking place within the state. A state may regulate in a way that has an incidental effect on the exercise of First Amendment rights (cf. *City of Erie v. Pap's A.M.*, No. 98-1161 (Mar. 29, 2000)), but the Utah Act cannot be defended on that ground; it directly targets the First Amendment activities of advice-giving and direct mail expression. It is in no way comparable to, for example, a general regulation of lawyers or accountants. Only organizations that give advice specifically to help make free speech more effective are subject to Utah's licensing and disclosure rules. The Utah Act then compounds the restriction on expression by placing a prior restraint on nonprofit organizations that wish to mail into Utah, merely because such organizations rely on the advice of out-of-state consultants. This cannot be squared with the First Amendment.

2. Utah not only has targeted speech for regulation; it has regulated that speech by means of a prior restraint. An organization may not solicit in Utah until its fundraising consultant has obtained a permit. Had ATA acted as a fundraising consultant without prior approval, it could have been subject to an administrative fine or even a criminal prosecution. Utah Stat. Ann. §§ 13-22-3(3), 13-22-4(1). This is a classic prior restraint. "'Any system of prior restraints of expression comes to this Court bearing a heavy presumption against its constitutional validity.'" *New York Times Co. v. United States*, 403 U.S. 713, 714 (1971), quoting *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 70 (1963).

See also *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 559 (1976) ("[P]rior restraints on speech * * * are the most serious and the least tolerable infringement on First Amendment rights."); *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546, 558 (1975). Utah failed to make any showing that there is no less restrictive means of accomplishing its purported goal, or even that the Act does in fact support any legitimate state goal.[8]

Moreover, in order to obtain a permit, ATA must make extensive disclosures of information—disclosures that go to the heart of its First Amendment activities, such as information about the plans and strategies it is suggesting to its client. Such disclosures are unrelated to any legitimate state purpose. The Act itself provides no deadlines within which the Division must act on an application for a license, and although the Division has, by regulation, promulgated deadlines for itself, there is still no requirement that administrative review be concluded within a certain time or with other procedural safeguards of First Amendment rights. See Pet. App. 15a-16a.

3. The court of appeals asserted that the Utah Act is "[c]ontent neutral" and therefore "subject to 'an intermediate level of scrutiny'" (Pet. App. 3a; citation omitted). The Act is not content neutral; it applies to ATA only because of the content both of ATA's advice and of the speech of ATA's clients.

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[8] The court of appeals incorrectly relied on the plurality opinion in *FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215 (1990), to conclude that a prior restraint on a nonprofit organization's direct mail is acceptable. But *FW/PBS, Inc.*, dealt with a city's zoning of bookstores distributing sexually-oriented material within the city's boundaries. Clearly such a standard is inappropriate for a restriction, like the Utah Act, that reaches outside the state's borders to regulate core First Amendment expression—and that therefore must be subject to "exacting scrutiny" (*Meyer v. Grant*, 486 U.S. 414, 420 (1988)). The court of appeals also, remarkably, was willing to accept a prior restraint on the distribution of core political speech as the "status quo" applicable to a business seeking a business license in the jurisdiction in which it does business. Pet. App. 16a.

See, *e.g.*, Utah Code Ann. § 13-22-2 (1)(a), (3), (11)(a)(i). Beyond that, however, the court of appeals' decision to apply intermediate scrutiny is wholly mistaken. This Court has made it unmistakably clear that regulations like the Utah Act "'involve[] a limitation on political expression subject to exacting scrutiny.'" *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 346 (1995), quoting *Meyer v. Grant*, 486 U.S. 414, 420 (1988). See also *Turner Broadcasting System v. FCC*, 512 U.S. 622, 642 (1994).[9]

The court of appeals' misapplication of this Court's precedents governing strict scrutiny in First Amendment cases itself warrants further review. But whatever the appropriate level of scrutiny, respondent and the courts below have conspicuously failed to identify *any* interest that supports the restrictions imposed on ATA. See *Nixon v. Shrink Missouri Government PAC*, 120 S. Ct. 897, 907 (2000) ("We have never accepted mere conjecture as adequate to carry a First Amendment burden"). The court of appeals blandly stated that this Court "has indicated that registration and disclosure provisions do not raise First Amendment problems." Pet. App. 5a. But the court of appeals then cited passages from this Court's opinions in *Secretary of State v. Munson*, *supra*, and *Riley v. National Federation of the Blind*, *supra*, which referred explicitly to "fundraisers." See Pet. App. 5a, quoting *Munson*, 467 U.S. at 968 n. 16, and *Riley*, 487 U.S. at 795, 800. The district court did the same thing. Pet. App. 26a-27a.

This is an obvious, and revealing, error. ATA is indisputably not a fundraiser. Its contract specifies that it does not solicit funds, and Utah never suggested that ATA was required to obtain a permit under the extensive provisions of the Charitable

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[9] Even if the Utah Act were somehow found to be content-neutral, it places a prior restraint on core political speech rather than regulating the time, place, or manner of an activity. This is an independently sufficient reason to require strict scrutiny.

Solicitations Act that apply to professional fundraisers.[10] Whatever the justifications for reasonable regulation of individuals engaged in solicitation, there simply is no reason for Utah to require a fundraising *consultant* to seek a license and to make the extensive disclosures required by the Act. Neither the state nor the courts below ever explained why Utah cannot protect its legitimate interests by reasonable regulation of the organizations that engage in solicitation and that come into actual contact with citizens of Utah. Of course, it is conceivable that a fundraising consultant—or anyone else, anywhere in the world—could aid and abet an effort to commit a fraud against Utah citizens. But those situations can be addressed by the application of appropriate criminal and tort laws. The prior restraint imposed by Utah law is wholly unjustified and overly broad—and certainly cannot meet the heavy burden needed to sustain a substantial, prior restraint on First Amendment rights, especially those involving interstate mail.

II. THE UTAH ACT VIOLATES THE COMMERCE CLAUSE.

1. The Utah Act regulates a transaction—the contract between ATA and Judicial Watch for the provision of services—that took place outside its borders. This is a violation of the dormant Commerce Clause, even if the transaction had effects with Utah. The Commerce Clause "'precludes the application of a state statute to commerce that takes place wholly outside of the State's borders, whether or not the commerce has effects within the State'" (*Healy v. The Beer Institute, Inc.*, 491 U.S. 324, 336 (1989), quoting *Edgar v. MITE Corp.*, 457 U.S. 624, 642-43 (1982) (plurality opinion)). The Court has specifically ruled that "[f]orcing a merchant to seek regulatory approval in one State

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[10] In addition, the passages in *Munson* and *Riley*—which were, in any event, dicta—were addressed to door-to-door, in-person solicitation. As we have explained, that form of solicitation creates much greater risks of fraud and overreaching than direct mail does.

before undertaking a transaction in another directly regulates interstate commerce" in violation of the dormant Commerce Clause. *Brown-Forman Distillers Corp. v. New York State Liquor Authority*, 476 U.S. 573, 582 (1986). This is, of course, precisely what Utah did here: it explicitly required Judicial Watch and ATA to obtain approval, in Utah, of a contract they entered and executed in Virginia.

2. The Utah Act violates the Commerce Clause for that reason alone. In addition, however, licensing and disclosure requirements like those imposed by the Utah Act necessarily limit ATA's ability to engage in interstate transactions with nonprofit organizations interested in conducting national direct mail campaigns. Those requirements also limit the ability of such organizations to communicate by mail with citizens of other states.

Direct mail is a classic form—indeed, perhaps the purest form—of interstate commerce. It would be deeply inconsistent with the idea of a federal union for a state to erect obstacles to efforts by citizens of other states to communicate with the state's citizens. The court of appeals conceded that the Utah Act's "provisions certainly burden interstate commerce for out-of-state firms like American Target." Pet. App. 18a. Accordingly, under this Court's decision in *Pike v. Bruce Church*, 397 U.S. 137, 142 (1970), the question is, as this Court has said, whether the state's legitimate purposes can "be promoted as well with a lesser impact on interstate activities." *Ibid.*

The court of appeals' answer to that question is again both revealing and wholly inadequate: "In its legitimate campaign against fraudulent solicitations, the state would be severely hampered if allowed only to regulate in-state solicitors." Pet. App. 18a. ATA is, of course, not a solicitor. The question is not whether the state may regulate out-of-state firms that send solicitors into Utah. Rather, the question is why the state finds it necessary to regulate out-of-state fundraising consultants who

never come into contact with its citizens. The court below never even attempted to answer that question.[11]

Beyond that, the court of appeals' formulation is mistaken because it leaves wholly out of the picture the burdensome nature of Utah's regulation. Even if regulation with less of an impact on interstate commerce might be justifiable, Utah must show why it cannot protect its legitimate interests without *this* form of regulation—a licensing scheme coupled with a prior restraint and intrusive disclosure requirements. Unless the state can explain why the application of its basic civil, criminal, and regulatory laws is insufficient—why it must single out fund-raising consultants for an extraordinary regulatory regime—it has not justified its conceded burden on interstate commerce.

3. Finally, the Utah Act is inconsistent with this Court's decisions in *Quill Corp. v. North Dakota*, 504 U.S. 298 (1992), and *National Bellas Hess, Inc. v. Department of Revenue*, 386 U.S. 753 (1967). Those decisions establish that, under the Commerce Clause, a state may not require a firm to collect sales taxes or use taxes when the firm's only contact with state residents is by mail or common carrier. See *Quill Corp.*, 504 U.S. at 314-18. These decisions therefore raise serious questions about whether a state may (without congressional authorization) impose regulatory requirements on direct mail solicitors—whose nexus or degree of contact with the state is, if anything, less than that of the firms that *Quill Corp.* exempted from taxation. As in *Quill*, the Court should consider "the effects of state regulation on the national economy" (*id.* at 312)—which would involve the impact not only of the Utah Act but the potential (which is not only real but growing) of 50 states and 6000 local jurisdictions creating similar barriers. See, *e.g.*, *American Charities*

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[11] In addition, as ATA repeatedly pointed out below, there are numerous existing laws that provide effective means for Utah and its citizens to protect against fraud. See Dist. Ct. App. 53-56, 508.

v. Pinellas County, 32 F.Supp.2d 1308 (M.D. Fla. 1998), on appeal, No. 99-10945A (11th Cir.).

In any event, however, fundraising consultants like ATA have no contact with Utah residents whatever—by mail or otherwise. If even firms that have contact by mail with Utah residents may not be required to collect sales and use taxes, then necessarily a firm that, like ATA, does not even have that form of contact may not be subject to a license and highly burdensome prior restraint on speech.

III. THE COURT OF APPEALS' DECISION UPHOLDING THE UTAH ACT ERRONEOUSLY RESOLVES AN IMPORTANT AND UNSETTLED ISSUE UNDER THE DUE PROCESS CLAUSE.

It is well established that the Due Process Clause limits a state's power to apply its laws to entities and transactions with which it has an insufficient connection. See, *e.g.*, *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 814-23 (1985); *Allstate Insurance Co. v. Hague*, 449 U.S. 302 (1981); *Home Insurance Co. v. Dick*, 281 U.S. 397, 407-11 (1930). Here, Utah seeks to impose an intrusive regulatory regime on ATA—a Virginia corporation that does no business in Utah, that has (as the state stipulated) no "offices, employees, directors, agents, bank accounts or real property in Utah" (Dist. Ct. App. 227), and that has no commercial relations with any Utah firm. Utah seeks to impose this regulatory regime on ATA because ATA entered a contract with Judicial Watch, a nonprofit corporation located in Washington, D.C. (*ibid.*). This licensing scheme is imposed merely by virtue of Judicial Watch's mailing letters into Utah.

Unlike a legitimate business licensing law, the Utah Act regulates an out-of-state entity that provides out-of-state services to another out-of-state entity—and the trigger for regulation is that those entitities engage in core political activities protected by the First Amendment. This is not a case of a state regulating

professional advice given within the state's boundaries or given with respect to an individual state's laws. It is advice about public policy communications mailed nationally, irrespective of any given state.

The court of appeals ruled that the requirements of the Due Process Clause were nonetheless satisfied because ATA "purposefully direct[ed] efforts toward residents of" Utah. Pet. App. 20a. But the court of appeals derived this standard from cases addressing the Due Process Clause limits on a state's power to assert personal jurisdiction over litigants in its courts. See *id.* at 19a-20a, citing *Burger King v. Rudzewicz*, 471 U.S. 462, 476 (1985). The court of appeals then concluded, in cursory fashion, that ATA's putative relationship with Utah would necessarily give the state the power to subject ATA to legislative regulation too. See Pet. App. 20a.

The court of appeals' conflation of "adjudicative" and "legislative" jurisdiction, for Due Process purposes, is an egregious expansion of regulatory authority that raises a fundamental and important question requiring this Court's review. The Court has never fully clarified the relationship between these two ways in which a state may assert jurisdiction over a foreign person or entity. Indeed, three members of the Court have recently made a point of emphasizing that "the due process standards for adjudicative jurisdiction and those for legislative (or prescriptive) jurisdiction are [not] necessarily identical" (*Quill Corp.*, 504 U.S. at 319-20 (Scalia, J., concurring)). The court of appeals' mistaken treatment of this important question merits this Court's review.

Because of the basic constitutional issues at stake, and because of the enormous practical impact of the decision of the court of appeals on the millions of citizens who receive important information and communications through direct mail, the Court should review the decision below.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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